No. 03-1602

In the Supreme Court of the United States

ARTICHOKE JOE'S, ET AL., PETITIONERS

v.

GALE A. NORTON, SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

PAUL D. CLEMENT
Acting Solicitor General
Counsel of Record
THOMAS L. SANSONETTI
Assistant Attorney General
DAVID C. SHILTON
JOHN EMAD ARBAB
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether Proposition 1A, an amendment to the California Constitution, which adopted an exception for certain gaming by Indian Tribes on Indian lands from the State's general prohibition against casino gambling, is consistent with the Indian Gaming Regulatory Act, 25 U.S.C. 2701 *et seq.*

2. Whether Proposition 1A, which does not authorize class III gaming in California other than by Indian Tribes on Indian lands, violates the equal protection principles of the United States Constitution.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

In the Supreme Court of the United States

No. 03-1602

ARTICHOKE JOE'S, ET AL., PETITIONERS

v.

GALE A. NORTON, SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-57a) is reported at 353 F.3d 712. The opinion of the district court (Pet. App. 58a-142a) is reported at 216 F. Supp. 2d 1084.

JURISDICTION

The judgment of the court of appeals was entered on December 22, 2003. A petition for rehearing was denied on March 1, 2004. Pet. App. 143a-144a. The petition for a writ of certiorari was filed on May 27, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The Indian Gaming Regulatory Act (IGRA), 25 U.S.C. 2701 *et seq.*, authorizes Indian Tribes and States

to enter into compacts under which a Tribe may conduct "class III" gaming (such as banked card games and slot machines) on Indian lands. The State of California adopted Proposition 1A, an amendment to the California Constitution, to enable Indian Tribes to conduct class III gaming in accordance with IGRA on Indian lands in California. The State of California and a number of Indian Tribes negotiated compacts that grant the Tribes exclusive class III gaming rights on their lands. Acting pursuant to her authority under IGRA, the Secretary of the Interior approved those compacts. Petitioners, which are non-Indian entities that cannot conduct certain types of class III gaming under California law, sued respondent federal and state officials, challenging the validity of the compacts. Petitioners asserted that Proposition 1A and the compacts violate IGRA and the equal protection provisions of the United States Constitution. The United States District Court for the Eastern District of California granted summary judgment to respondents. Pet. App. 58a-142a. The court of appeals affirmed. *Id.* at 1a-57a.

1. This Court ruled in *California* v. *Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), that Public Law 280 (Act of Aug. 15, 1953, ch. 505, 67 Stat. 588 (codified at 18 U.S.C. 1162 and 28 U.S.C. 1360)), which allows specified States to exercise prescribed authorities on Indian lands, did not authorize the State of California to enforce state gaming regulations involving bingo on Indian reservations. See 480 U.S. at 209-212. In response to *Cabazon*, Congress enacted IGRA, which establishes a regulatory structure for Indian gaming in order to "promot[e] tribal economic development, self-sufficiency, and strong tribal governments" and to shield Indian Tribes "from organized crime and other corrupting influences." 25 U.S.C. 2702(1) and (2).

See Pet. App. 6a. Among other things, IGRA regulates "class III gaming," which includes banked card games and slot machines. 25 U.S.C. 2703(8); see Pet. App. 6a-7a.

Under IGRA, class III gaming on Indian lands is lawful only if three conditions are met. 25 U.S.C. 2710(d)(1). First, the class III gaming must be authorized by a tribal ordinance or resolution that meets certain specified conditions and that has received approval from the Chairman of the National Indian Gaming Commission, a federal agency created by IGRA. 25 U.S.C. 2703(3), 2704, 2710(d)(1)(A). Second,—and of particular relevance to the present case—the class III gaming must be "located in a State that permits such gaming for any purpose by any person, organization, or entity." 25 U.S.C. 2710(d)(1)(B). Third, the class III gaming must be conducted in conformance with a "Tribal-State compact entered into by the Indian tribe and the State" pursuant to a negotiation process established by IGRA. 25 U.S.C. 2710(d)(1)(C) and (d)(3). To be effective, such a tribal-state compact must be approved by the Secretary of the Interior. 25 U.S.C. 2710(d)(8).

After the enactment of IGRA, a number of Indian Tribes in the State of California sought to negotiate tribal-state compacts to permit the operation of class III gaming activities on their reservations. Pet. App. 8a. At that time, the California Constitution prohibited the State from authorizing lotteries and casino gambling in the State. Cal. Const. Art. IV, § 19(a) and (e); see Pet. App. 145a-146a. Those prohibitions generally banned slot machines and other class III gaming activities for which the Indian Tribes wished to negotiate compacts. See *id.* at 8a, 10a. Ultimately, the Governor of California negotiated, and the state legislature

ratified, 57 compacts with Indian Tribes that permitted those Tribes to operate slot machines and other class III gaming activities on their reservations. Those compacts, however, were made contingent upon the passage of an amendment to the California Constitution. *Id.* at 9a-10a.

In March 2000, the people of California ratified an amendment to the state constitution known as Proposition 1A. Pet. App. 11a (codified at Cal. Const. Art. IV, § 19(f)). Proposition 1A provides: "Notwithstanding subdivision (a) and (e), and any other provision of state law, the Governor is authorized to negotiate and conclude compacts, subject to ratification by the Legislature, for the operation of slot machines and for the conduct of lottery games and banking and percentage card games by federally recognized Indian tribes on Indian lands in California in accordance with federal law. Accordingly, slot machines, lottery games, and banking and percentage card games are hereby permitted to be conducted and operated on tribal lands subject to those compacts." *Ibid.* The general prohibition against such gaming was not altered for such gaming outside of Indian lands. *Id.* at 4a, 12a.

Acting pursuant to IGRA, the Assistant Secretary of the Interior for Indian Affairs, on behalf of the Secretary, reviewed and approved the 57 compacts that the Governor and the Tribes had previously negotiated. Pet. App. 11a, 70a. In approving the compacts, the Assistant Secretary found that "[t]he Governor can, consistent with the State's amended Constitution, conclude a compact giving an Indian tribe, along with other California Indian tribes, the exclusive right to conduct certain types of Class III gaming." *Id.* at 11a. The Governor later negotiated, and the Secretary approved,

five other compacts with additional Indian Tribes. *Id.* at 11a-12a.

2. Petitioners are non-Indian card clubs and charities in California that are not entitled to operate slot machines or conduct certain other types of class III gaming under state law. See Pet. App. 8a, 12a, 73a. Petitioners brought this lawsuit against federal and state officials to invalidate the tribal-state compacts. Petitioners asserted that Proposition 1A and the tribal-state compacts violate Section 2710(d)(1)(B) of IGRA, which requires that gaming conducted on Indian lands must be "located in a State that permits such gaming for any purpose by any person, organization, or entity." 25 U.S.C. 2710(d)(1)(B). They also contended that Proposition 1A violates their right to equal protection of the laws under the Fifth and Fourteenth Amendments of the United States Constitution. See Pet. App. 4a, 14a.

On cross-motions for summary judgment, the district court entered judgment in favor of respondents. Pet. App. 77a, 141a-142a. The court first concluded that "the exclusive class III gaming compacts, as permitted by Proposition 1A, are within the plain language of IGRA." *Id.* at 122a-123a; see *id.* at 60a. The court rejected petitioners' argument that Section 2710(d)(1)(B) allows Indian Tribes to engage in class III gaming only if state law also allows non-Indians to engage in class III gaming. *Id.* at 121a. The court determined instead that it is sufficient if state law explicitly authorizes Indian Tribes to engage in such gaming. *Ibid.* The court concluded that Proposition 1A satisfies Section 2710(d)(1)(B)'s state authorization requirement because "California permits class III gaming by tribes with compacts under Proposition 1A." *Id.* at 122a.

The district court rejected petitioners' contention that Proposition 1A and the tribal-state compacts deprive petitioners of the equal protection of the laws. See Pet. App. 60a-61a, 133a-138a. The court determined that rational-basis review is appropriate. *Ibid.* The court concluded that "the compacts, entered into under IGRA, are designed to encourage tribes to become politically and economically self-sufficient while preserving tribal sovereignty and mitigating organized crime, all of which fit within the broad mandate of the federal government's trust obligation." *Id.* at 135a. The court ruled that "the Secretary's approval of the compacts was rationally related to the furtherance of Congress' trust obligations and does not violate equal protection." *Id.* at 136a.

3. The court of appeals affirmed, holding that Proposition 1A and the tribal-state compacts are "consistent with IGRA" and "do not violate [petitioners'] rights to equal protection of the laws." Pet. App. 57a.

The court of appeals determined that neither the text of Section 2710(d)(1)(B), nor its "context, purpose, and legislative history," unambiguously resolves whether Proposition 1A meets IGRA's requirements. See Pet. App. 16a-23a, 36a. The court of appeals therefore invoked the canon of construction that "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit" (*Montana* v. *Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985)). Pet. App. 32a-34a. Applying the "*Blackfeet* presumption," the court of appeals ruled that "California's Proposition 1A 'permits' class III gaming within the meaning of IGRA by legalizing such gaming operations only when conducted by the 'entity' of an Indian tribe." *Id.* at 36a.

The court of appeals next rejected petitioners' equal protection arguments. Pet. App. 36a-57a. The court concluded that, because Proposition 1A grants preferential treatment to Indian Tribes based on their political status, rather than the race of their members, Proposition 1A is subject to rational-basis review. *Id.* at 36a-45a (citing, *e.g.*, *United States* v. *Antelope*, 430 U.S. 641, 645-646 (1977)). The court found that Proposition 1A is a rational means for California to regulate the growth of class III gaming in the State and to foster tribal sovereignty and self-sufficiency. See Pet. App. 46a-57a. The court accordingly ruled that Proposition 1A does not violate equal protection principles. *Id.* at 56a-57a.

ARGUMENT

The court of appeals correctly held that California Proposition 1A, which adopted an exception for class III gaming by Indian tribes from the general state prohibition against casino gambling, is consistent with IGRA and does not violate petitioners' right to equal protection of the laws. The court of appeals' decision, which addresses issues of first impression, does not conflict with any decision of this Court or of another court of appeals. Further review by this Court is therefore not warranted.

1. The court of appeals correctly held that Proposition 1A is consistent with Section 2710(d)(1)(B), which imposes as one condition for the lawful operation of class III gaming on Indian lands that such gaming be "located in a State that permits such gaming for any purpose by any person, organization, or entity." The plain language of that provision demonstrates that it is satisfied here. California law—the new subdivision (f) of Article IV, Section 19, of the California Constitution

—expressly states that the specified types of games conducted by Indian Tribes "are hereby permitted," subject, of course, to tribal-state compacts as required by federal law. Pet. App, 146a. An Indian Tribe certainly qualifies as an "entity." Because Section 2710(d)(1)(B) is satisfied if the class III gaming in question is permitted under state law by "*any* person, organization, or entity" (25 U.S.C. 2710(d)(1)(B) (emphasis added)), the authorization in the California Constitution adopted by Proposition 1A for Indian Tribes to conduct such gaming is sufficient. See *United States* v. *Monsanto*, 491 U.S. 600, 609 (1989) (statute's use of "any" is "broad and unambiguous"). Petitioners' contrary argument (Pet. 12-21) is incorrect and raises no issue meriting this Court's review.

a. Petitioners contend (Pet. 12) that the court of appeals' interpretation of IGRA "violates the plain meaning of the statute." In support of that claim, petitioners primarily rely on Section 2710(d)(1)(B)'s phrase "permits such gaming." Petitioners assert (Pet. 12) that the term "permits" "must refer to gaming and slot machines on non-Indian land, because the state has no legal authority to 'permit' gaming * * * only on Indian land." Petitioners therefore contend (Pet. 14) that "IGRA must be interpreted to mean that tribes may conduct only those games allowed others on non-Indian lands." Petitioners' contentions lack merit.

Petitioners' "plain meaning" interpretation of the term "permits" is contrary to the text of Section 2710(d)(1)(B) itself. As explained above, Section 2710(d)(1)(B), without qualification, authorizes class III gaming on Indian lands if, among other things, the State in question "permits" class III gaming "for *any* purpose by *any* person, organization, or entity." 25 U.S.C. 2710(d)(1)(B) (emphasis added). Petitioners,

however, would amend that text to read "permits such gaming on non-Indian lands." The district court correctly rejected petitioners' proffered construction as contrary to the language of the statute. See Pet. App. 118a, 121a; *Chickasaw Nation* v. *United States*, 534 U.S. 84, 89 (2001) (declining to construe another provision of IGRA in a fashion that would add words to the text). Proposition 1A expressly "permits" class III gaming in California. See Pet. App. 11a (stating that slot machines and other class III gaming activities "are hereby permitted * * * on tribal lands"). Proposition 1A therefore satisfies IGRA's "permits" requirement.

Furthermore, petitioners' argument, which rests on the premise that California, acting alone, lacks authority to permit class III gaming on Indian lands (see Pet. App. 17a), cannot be squared with three countervailing points that the court of appeals correctly identified: (1) before IGRA was enacted, Public Law 280 authorized California to enforce a generally applicable prohibition of class III gaming on Indian lands, see *Cabazon*, 480 U.S. at 207-208; (2) when Congress enacted IGRA, it gave California the additional authority to adopt regulations applicable to Indian gaming that *Cabazon* found lacking, see 18 U.S.C. 1166; and (3) IGRA's use of the word "permit[]" encompasses not only the State's legally binding affirmative acts, but also its decision not to enact a general prohibition, see *Rumsey Indian Rancheria of Wintun Indians* v. *Wilson*, 64 F.3d 1250, 1257 (9th Cir. 1994), amended on other grounds, 99 F.3d 321 (9th Cir. 1996), cert. denied, 521 U.S. 1118 (1997). See Pet. App. 17a. Thus, even before *Cabazon*, and clearly after IGRA, California could ban class III gaming under a law of general prohibition or, conversely, "permit" class III gaming by not enacting such a

prohibition or by not extending it to Indian lands. See *id.* at 17a-20a.[1]

In support of their "plain meaning" argument, petitioners also rely (Pet. 12) on Section 2710(d)(6) of IGRA, 25 U.S.C. 2710(d)(6). Section 2710(d)(6) places a limit on the longstanding federal prohibition (commonly known as the Johnson Act, 15 U.S.C. 1175) on the possession or use of slot machines and other gambling devices in Indian country. That prohibition is made inapplicable "to any gaming conducted under a Tribal-State compact that is entered into * * * by a State in which gambling devices are legal." 25 U.S.C. 2710(d)(6). Focusing on the final word "legal," petitioners assert (Pet. 12) that a State "has no legal authority to * * * make slot machines 'legal' only on Indian land." Petitioners' argument, however, rests on the same erroneous premise as their argument under Section 2710(d)(1)(B).

In the first place, in order for a State to render gambling devices "legal," it need not authorize such devices anywhere and everywhere in the State. States, for example, frequently permit slot machines to be installed only at particular locations, and this Court has

---

[1] Petitioners incorrectly suggest that the court of appeals should not have relied on 18 U.S.C. 1166 because that statute "does not apply to compact gaming." Pet. 13 (emphasis deleted). Section 1166(c)(2) does contain a provision stating that the term "gambling" in Section 1166(a) does not include "class III gaming conducted under a Tribal-State compact approved by the Secretary of the Interior under [IGRA]." 18 U.S.C. 1166(c)(2). That exemption was necessary to effectuate the compacting process established by IGRA. The exemption, however, has no bearing on a State's authority under Section 1166(a) to ban gambling in Indian country under a law of general prohibition and, conversely, to permit gambling in Indian country by not enacting such a prohibition.

recognized the broad latitude of the States to do so, subject only to rational basis review. See *Fitzgerald* v. *Racing Ass'n*, 539 U.S. 103 (2003). That principle is reflected in the Johnson Act itself, which generally prohibits the transportation of gambling devices into any place in a State, but then exempts from that prohibition transportation "to a place in any subdivision of a State if the State in which such subdivision is located has enacted a law providing for the exemption of such subdivision from the provisions of this section." 15 U.S.C. 1172(a). In view of the flexibility the Johnson Act accords to the State to allow gambling devices in only selected subdivisions of the State, there is no reason to believe that Congress intended Section 2710(d)(6) to limit the States' flexibility with respect to Indian reservations within their borders.

Moreover, under Section 2710(d)(6), the relevant issue is not whether a State has authority to make class III gaming legal "only on Indian land" (Pet. 12), but, rather, whether a State has authority to make class III gaming generally legal, including on Indian lands. And, as is true in the case of Section 2710(d)(1)(B), a State has authority to make gaming legal on Indian lands by declining to enact a law of general prohibition or by declining to extend such a law to Indian lands. Although petitioners reassert (Pet. 13) that a State must perform a "legally binding affirmative act" either to "permit" or to make "legal" class III gaming, petitioners cite no authority for that proposition, which the court of appeals correctly rejected. Pet. App. 19a; see *id.* at 15a n.11.[2]

---

[2] Contrary to petitioners' assertion (Pet. 12 n.11), the Sixth Circuit's dictum in *Keweenaw Bay Indian Cmty.* v. *United States*, 136 F.3d 469, cert. denied, 525 U.S. 929 (1998), does not support

Petitioners also err in contending (Pet. 17) that the court of appeals' decision conflicts with *Citizen Band Potawatomi Indian Tribe* v. *Green*, 995 F.2d 179 (10th Cir. 1993). In *Citizen Band Potawatomi*, the court concluded that, for purposes of Section 2710(d)(6), a tribal-state compact, standing alone, is not sufficient to make the covered gambling device "legal" and that a compact alone therefore does not render the gambling device exempt from the Johnson Act's prohibition on use in Indian country. *Id.* at 180-181. As the court of appeals here correctly noted, however, in distinguishing *Citizen Band Potawatomi*, the tribal-state compacts in this case do not stand alone; rather, Proposition 1A is the independent source of state law that permits the class III gaming. Under both IGRA and state law, however, no such gaming may actually be conducted by a given Tribe until a tribal-state compact is entered into and approved by the Secretary. See Pet. App. 16a-17a.

Petitioners incorrectly suggest (Pet. 18-19; see Pet. 14 n.14) that Proposition 1A does not actually legalize class III gaming independently of the tribal-state compacts because the text of Proposition 1A permits the gaming "subject to those compacts." Pet. App. 11a. That construction ignores the plain import of Proposi-

---

their interpretation of IGRA. That dictum states that, under IGRA, "tribes are entitled to engage in all forms of Class III gaming that a state permits for other citizens." *Id.* at 473. The different issue here, however, is whether IGRA *requires* a State to permit others to engage in types of class III gaming that the State permits Indian Tribes to conduct. Petitioners are also mistaken in suggesting (Pet. 12 n.11) that the court of appeals' decision in *Rumsey*, 64 F.3d at 1250, supports their position. Rather, as the court of appeals explained in distinguishing that case, "*Rumsey* did not hold that a state *may* not give tribes what others do not have, but only that a state *need* not do so." Pet. App. 21a.

tion 1A's full text, which states that class III gaming is "hereby permitted to be conducted and operated on tribal lands subject to those compacts." *Ibid.* By its express terms, Proposition 1A generally authorizes class III gaming on Indian lands in California, subject to such particular terms and conditions as the Tribes and the State may negotiate in their specific compacts pursuant to IGRA. See 25 U.S.C. 2710(d)(3)(C) (listing appropriate subjects of negotiation). IGRA independently imposes the requirement that class III gaming be in accordance with a tribal-state compact, 25 U.S.C. 2710(d)(1)(C), and state law can hardly be faulted for incorporating that requirement of federal law.

b. There is no merit to petitioners' contention (Pet. 14) that the legislative history of IGRA "confirms that Congress did not intend to authorize tribal casino monopolies." Rather, as the court of appeals correctly found, the legislative history is "silent on the specific issue of tribal monopolies on class III gaming" and "refers only obliquely to the economic concerns of third parties." Pet. App. 26a (discussing S. Rep. No. 446, 100th Cong., 2d Sess. (1988)). The legislative history that petitioners cite does not demonstrate otherwise.

Petitioners primarily rely (Pet. 14-15) on scattered passages from the Senate Report that accompanied IGRA. Those passages do not suggest that Congress intended to require States to permit class III gaming by non-Indian entities as a condition of permitting class III gaming by Indian tribes on Indian lands. Rather, at most, the passages reveal Congress' expectation that, *if* a State (unlike California) permits non-Indian class III gaming, that State should not use the statutory

compacting process as a means of shielding non-Indian operators from competition from Indian Tribes.[3]

IGRA was intended to give the States a voice in whether and in what manner class III gaming would occur on Indian lands within their borders and to encourage agreement between Tribes and States on that subject in order to enable Tribes to proceed with such gaming to promote economic development and self-sufficiency. IGRA was not addressed to gaming on non-Indian lands. That remains a matter within the sovereign prerogatives of the States. There accordingly is no basis in the background and purposes of IGRA for concluding that Congress intended to bar a Tribe and a State from entering into a compact allowing class III gaming on Indian lands if the State did not also permit such gaming on non-Indian lands.

c. Petitioners incorrectly contend (Pet. 19) that this Court's decisions should have foreclosed the court of appeals from relying on the interpretive canon that "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Montana* v. *Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985). Petitioners cite no decision of this Court (or any other authority) for that pro position. Petitioners observe (Pet. 19) that the Court referred to that interpretive canon as a "guide[]" in *Chickasaw Nation*, 534 U.S. at 94, but the Court did not hold that an interpretive guide cannot determine the outcome in

---

[3] See S. Rep. No. 446, *supra*, at 13 (expressing the "Committee's intent that the compact requirement for class III not be used as a justification by a State * * * for the protection of other State-licensed gaming enterprises from free market competition with Indian tribes"); *id.* at 2 (noting the goal of "achiev[ing] a fair balancing of competitive economic interests"). See also Pet. App. 27a-28a.

a particular case. Indeed, such a limitation on the use of the *Blackfeet Tribe* canon would deprive courts of an established tool, known to Congress, for interpreting ambiguous congressional enactments involving Indian Tribes. See, *e.g.*, *County of Yakima* v. *Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 269 (1992) (concluding that "[w]hen we are faced with * * * two possible constructions" of a statute, "our choice between them must be dictated" by the *Blackfeet* principle); *Quinault Indian Nation* v. *Grays Harbor County*, 310 F.3d 645, 647 (9th Cir. 2002) (applying the *Blackfeet* principle to "tip[] the balance" in favor of Indian tribes where the interpretive issue was "plagued with ambiguity"). Moreover, in this case, the interpretive canon is reinforced by principles of deference to the construction of the statute by the responsible administrative agency. The Assistant Secretary of the Interior, in exercising the Secretary's statutory authority to approve tribal-state compacts, determined that Cali fornia's compacts with the Tribes were lawful under IGRA. See Pet. App. 11a.

There is no merit to petitioners' assertion (Pet. 20-21) that the court of appeals' use of the *Blackfeet* principle in this case is inconsistent with *INS* v. *St. Cyr*, 533 U.S. 289 (2001). In *St. Cyr*, the Court addressed whether either of two federal statutes at issue stripped the federal courts of authority to decide a particular question of law in a habeas corpus proceeding. See *id.* at 298-314. Concluding that they did not, the Court explained that "the lack of a clear, unambiguous, and express statement of congressional intent to preclude judicial consideration on habeas of such an important question of law, strongly counsels against adopting a construction that would raise serious constitutional questions." *Id.* at 314. This case raises no such

constitutional concerns. See Pet. App. 35a (finding that an exception to the *Blackfeet* principle for avoidance of "constitutionally doubtful interpretations of a statute" is inapplicable here). See discussion, pp. 15-19, *infra*.

2. The court of appeals correctly held that Proposition 1A's creation of an exception from state gaming prohibitions for Indian Tribes on tribal lands in accordance with federal law does not deprive petitioners of the equal protection of the law. See Pet. App. 46a-57a. Petitioners' challenge (Pet. 21-29) to the court of appeals' ruling on that issue of first impression raises no issue meriting this Court's review.

a. This Court has repeatedly stated that the application of the equal protection component of the Due Process Clause of the Fifth Amendment to Indian Tribes must take into account the unique historical and political status of those entities. *E.g.*, *Antelope*, 430 U.S. at 645-646. "As long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed." *Morton* v. *Mancari*, 417 U.S. 535, 555 (1974). Petitioners do not directly challenge the court of appeals' conclusion (see Pet. App. 44a) that "under *Mancari*, rational-basis review applies" to this case. Rather, petitioners contend (Pet. 22) that, insofar as IGRA permits a State to create an exception from state gaming prohibitions only for Indian Tribes, IGRA "is not rationally tied to Congress' unique obligation towards Indians." That contention lacks merit.

Petitioners' contention rests on the erroneous premise (Pet. 23) that Congress' "unique obligation" toward Indian Tribes extends only to matters respecting "unique features of Indian culture and society." Rather, as this Court has explained, Congress pos-

sesses broad authority to enact laws designed to advance "the congressional goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development." *Cabazon*, 480 U.S. at 216. See, *e.g.*, *Moe* v. *Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 479-480 (1976) (Indian immunity from state taxes). Indeed, one of Congress's stated purposes in enacting IGRA was to provide a "means of promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. 2702(1).

There accordingly could be no serious question that Congress could unilaterally authorize class III gaming on Indian reservations, whether or not state law allows gaming outside of Indian reservations in the State. Congress has plenary authority over Indian affairs and the concomitant authority to render state law completely inapplicable on Indian reservations. Instead, Congress, in IGRA, has decided to allow the States to have a voice in whether class III gaming will be conducted on Indian lands within their borders, recognizing that States have an interest in such activities because they will attract substantial numbers of people from around the reservation and have effects outside of the reservation as well.

The rationality of Congress's choice under *federal* law does not depend on whether similar gaming is lawful as a matter of *state* law outside of Indian lands. A State (such as California) may be willing to permit class III gaming within the borders of the State, but only on condition that the gaming be confined to Indian lands. By allowing (but not requiring) a State to make that legitimate policy choice, IGRA rationally enhances the ability of Tribes located in such States to conduct class III gaming, should the Tribe conclude that its

interests are best served by conducting such gaming on its land.[4]

Petitioners err in relying (Pet. 22, 24) on this Court's decision in *Rice* v. *Cayetano*, 528 U.S. 495 (2000). *Rice* addressed whether, consistent with the Fifteenth Amendment, a State may enact an ancestry-based restriction on voter eligibility for a particular statewide election. Concluding that the State could not, the Court rejected the argument that such a voting restriction (which the Court found to be "race-based," *id.* at 517) was constitutionally permissible because it "fits the model of *Mancari*." *Id.* at 520. The Court explained that "[i]t does not follow from *Mancari* * * * that Congress may authorize a State to establish a voting scheme that limits the electorate for its public officials to a class of tribal Indians, to the exclusion of all non-Indian citizens." *Ibid.* The present case does not involve a federal enactment that purports to authorize States to limit the voting rights of non-Indians in elections for state office. Nothing in *Rice* suggests (much less holds) that Congress lacks constitutional authority under *Mancari* to allow class III gaming on Indian lands if the State concurs, whether or not the State allows gaming by non-Indians on non-Indian lands.

---

[4] Petitioners' assertion (Pet. 23) that "[a] casino gambling monopoly is not lawful simply because it is profitable" is not germane to this case. The issue here is not profitability, but rather, whether it is rational for Congress to give States the option of limiting class III gaming to Indian Tribes on Indian lands. Moreover, contrary to petitioners' suggestion (see Pet. 22), the court of appeals did not purport to hold that the mere profitability of class III gaming would justify a State's decision to exercise that option. See Pet. App. 46a-57a (concluding that Proposition 1A is rationally related to California's legitimate interests in regulating vice activity and fostering tribal sovereignty).

b. Petitioners also assert (Pet. 25) that California's decision in Proposition 1A to exempt gaming by Indian Tribes on tribal lands from the State's prohibition on casino gaming "cannot be justified as fostering tribal sovereignty." Petitioners, however, contest neither the court of appeals' conclusion that fostering tribal sovereignty is a legitimate state interest, nor its conclusion that Proposition 1A is valid if it is rationally related to that interest. See Pet. App. 46a-47a; *Washington* v. *Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 501 (1979). Rather, petitioners contend (Pet. 25) that Proposition 1A does not foster tribal sovereignty because "Proposition 1A is not confined to activities on Indian land," but instead prohibits non-Indian entities from engaging in class III gaming "*anywhere else in the state*." There is no merit to petitioners' argument.

California's determination not to extend the exemption to non-Indian lands has no bearing on whether Proposition 1A is rationally related to the goal of fostering tribal sovereignty. The people of California are entitled to conclude that they do not wish to permit class III gaming on non-Indian lands, but do wish to honor the desire of Indian Tribes to conduct such gaming on their own lands. As the court of appeals observed (Pet. App. 55a-56a), "[i]t is rational for Californians to be willing to recognize the separate sovereign interests of the tribes and to allow the tribes to make a different moral and economic choice than is made by the State as a whole."[5]

---

[5] Although petitioners allege (Pet. 26) that some Tribes have used Proposition 1A to establish casinos on non-Indian land selected to "offer[] the most advantageous business situation," the court of appeals expressly noted that this case involves only "class

Finally, petitioners contend (Pet. 27) that California's decision to limit the exemption in Proposition 1A to gaming by Indian Tribes on Indian lands cannot be justified as a regulation of "vice activity." Petitioners, however, contest neither the court of appeals' conclusion that regulation of vice activity is a legitimate state interest, nor its conclusion that Proposition 1A is rationally related to that interest. See Pet. App. 46a-47a, 54a. Rather, petitioners contend (Pet. 27) that "there is no meaningful distinction between monopolies of 'vice activities' and monopolies of other economic activities in terms of 'Congress' unique obligation toward the Indians.'" The court of appeals cogently rejected that contention, explaining:

> As a practical matter, Congress viewed gambling as a "unique form of economic enterprise" and was "strongly opposed to the application of the jurisdictional elections authorized by this bill to any other economic or regulatory issue that may arise between tribes and States in the future." As a constitutional matter, the state interests that justify, as a valid exercise of a state's police power, California's restriction of class III gaming operations to those conducted by Indian tribes on Indian lands are absent in the field of generic commercial activities. Most economic activities historically have not been deemed harmful.

III gaming operations that are located on Indian reservations or Indian trust lands." Pet. App. 43a n.16. For that reason, the court found it unnecessary to resolve the hypothetical dispute "whether lands that are purchased specifically for the purpose of conducting class III gaming activities are 'Indian lands' within the meaning of IGRA." *Ibid.*

Pet. App. 53a (quoting S. Rep. No. 446, *supra*, at 14). For those reasons, the court of appeals properly rejected petitioners' related contention (see Pet. 29) that a "parade of horribles—tribal monopolies on automobile dealerships, for example—is a likely consequence of our conclusion that legitimate state interests support a restriction of casino-style gambling to Indian lands." Pet. App. 53a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Acting Solicitor General
THOMAS L. SANSONETTI
Assistant Attorney General
DAVID C. SHILTON
JOHN EMAD ARBAB
Attorneys

AUGUST 2004